APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[FILED June 25, 2004]

NO. 03-1 1384

D.C. Docket No. 02-00609-CV-8-6-30 EAJ

RANDAL S. BRAGG, ROBERT I. CRABTREE, *et al.*,
Plaintiffs-Appellants,

versus

BILL HEARD CHEVROLET, INC. - PLANT CITY,
WFS FINANCIAL, INC., *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(June 25, 2004)

Before BLACK, BARKETT and STAHL*, *Circuit Judges*.

STAHL, *Circuit Judge*:

The issue before us is whether the district court correctly determined that plaintiff-appellant Randal Bragg failed to state a claim under the Truth in Lending Act, 15 U.S.C.

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* Honorable Norman H. Stahl, United States Circuit Judge for the First Circuit, sitting by designation.

§ 1601, *et seq.* ("TILA") against defendant-appellee Bill Heard Chevrolet Inc.-Plant City ("Bill Heard"). We hold that Bragg's complaint does state a claim under TILA, and reverse the decision below.

I. BACKGROUND

We take the following recitation of facts from Bragg's amended complaint. *See La Grasta v. First Union Securities, Inc.*, 358 F.3d 840, 845 (11th Cir. 2004); *Omar v. Lindsey*, 334 F.3d 1246, 1247 (11th Cir. 2003). Bill Heard is licensed in Florida as a motor vehicle dealer and a motor vehicle retail installment seller. On September 28, 2001, Bragg visited Bill Heard and decided to purchase a new 2002 Chevrolet Silverado truck. As a down payment, Bragg paid six hundred dollars in cash and traded in his 1994 Ford Escort, which Bill Heard valued at five hundred dollars.

On that day, Bragg signed one Standard Purchase Contract ("Purchase Contract # 1") and two standard Florida Simple Interest Vehicle Retail Installment Contracts ("RISC #1" and "RISC #2"). Bill Heard did not sign these documents. Purchase Contract #1 listed the selling price of the truck as $19,253.34, plus a Silencer Alarm ("SAP") for $399.00 and Vehicle Theft Registration ("VTR") for $199.00.[1] RISC # 1 listed an annual percentage rate ("APR") of 14.65 percent, a finance charge of $10,947.33, and amount financed of $21,158.91. RISC #2 listed an APR of 14.50 percent, a finance charge of $10,642.05, and amount financed of $21,158.91. Both RISCs included insurance and debt cancellation coverage ("GAP Protection") for a charge of

[1] VTR is an anti-theft etching identification program that provides insurance benefits to customers in the event that their cars are stolen. SAP is an alarm installed on the vehicle that also provides insurance benefits.

$495.00.[2] Bill Heard is listed as the "Creditor-Seller" in the RISCs.

Bragg also signed a Bailment Agreement for Vehicle Spot Delivery ("Bailment Agreement"). This permitted Bragg to take possession of the new vehicle immediately. The Bailment Agreement explicitly incorporated the terms of the Purchase Contract.

On October 1, 2001, Bill Heard contacted Bragg and requested that he sign additional documents. This time Bragg signed two new Purchase Contracts ("Purchase Contract #2" and "Purchase Contract #3") and two new RISCs ("RISC #3" and "RISC #4"). Purchase Contract #2 listed a selling price of $18,993.00, plus an Extended Service Contract price of $990.00, while Purchase Contract #3 listed a selling price of $18,993.00. Neither of these two Purchase Contracts contained charges for VTR and SAP. RISC #3 listed an APR of 14.89 percent, a finance charge of $11,699.11, and an amount financed of $22,176.18, while RISC #4 listed an APR of 14.89 percent, a finance charge of $11,102.69, and an amount financed of $21,046.09. All four of these contracts were backdated by Bill Heard to the date of Bragg's first visit, September 28, 2001. None of the contracts were executed by Bill Heard.

On October 5, Bill Heard assigned RISC #4 to Triad Financial Corporation, and Triad issued payment to Bill Heard for $19,982.24. This RISC was the only one signed by Bill Heard.

Central to Bragg's claims is Bill Heard's "spot delivery" procedure. Here, we stress again that at this stage, we must accept as true the well-plead factual allegations in Bragg's

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[2] GAP protection is coverage offered to a customer in the event that the vehicle is determined by the relevant insurance company to be a total loss as a result of theft or physical damage. It covers the shortfall between the applicable insurance coverage and any amount still owed.

complaint, as well as all inferences from those allegations in the light most favorable to Bragg. *La Grasta*, 358 F.3d at 845; *Omar*, 334 F.3d at 1247. Under "spot delivery," the customer is presented with a Purchase Agreement, RISC, and Bailment Agreement. Bill Heard then delivers the car to the customer "on the spot" on the same date that the customer signs the documents, and allows him or her to take the car without the passage of title. The customer in return typically makes a cash deposit or trades in an existing vehicle as a down payment. Bragg contends that customers like him are "under the impression they have purchased a car under certain sales and finance terms." On occasion, Bill Heard will notify a customer that it was not able to secure the financing rates agreed to in the documents and ask them to sign new agreements with less favorable financing terms. If a new RISC is executed, the financing terms are calculated from the date of actual delivery of the vehicle to the customer. According to Bragg, Bill Heard never executes the original RISCs. Instead, it uses the initial lower financing rates to entice the customers under a "bait and switch" scheme. Bragg also asserts that Bill Heard requires forfeiture of the down payment or trade-in vehicle if the customer refuses to accept the new financing terms.[3]

On November 30, 2001, Bragg filed a class action suit against Bill Heard in state court on behalf of himself and several other similarly situated customers. The complaint set forth five counts: (1) violations of Florida's Deceptive and Unfair Trade Practices Act, Fl. Stat. §§ 501.201, *et seq.*; (2) unjust enrichment; (3) violations of TILA and Regula-

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[3] According to Bill Heard, if financing is not obtained, the consumer has no obligation to purchase the vehicle and instead must pay Bill Heard twenty cents for each mile driven during the bailment agreement. In that case, it contends, a deposit or trade-in car would be returned to the customer. If financing is obtained, the buyer receives title to the vehicle purchased and is not responsible for any rental fees.

tion Z; (4) violations of Florida's Motor Vehicle Retail Sales Finance Act, F1. Stat. §§ 520.01, *et seq.*; and (5) declaratory and injunctive relief. Bragg's TILA claim asserted that Bill Heard (1) failed to make required TILA disclosures prior to the buyer's consummation of credit terms; (2) failed to include in the finance charge the costs of credit insurance products sold in connection with the credit transaction, when it had failed to make the required disclosures as a pre-condition to excluding those charges from the finance charge; (3) failed to accurately disclose credit terms; (4) failed to state clearly that the APRs in the first two RISCs were "estimates"; and (5) failed to disclose any amounts it paid to third persons on Bragg's behalf.

Bill Heard removed the case to federal district court and on April 16, 2002, it moved to dismiss all of Bragg's claims pursuant to Fed. R. Civ. P. 12(b)(6). On September 1, 2002, the district court granted in part and denied in part Bill Heard's motion to dismiss and granted Bragg leave to file an amended complaint. We need not set forth each of the district court's dispositions in this first order.

On September 25, 2002, Bragg filed an amended complaint. In turn, Bill Heard moved to dismiss the TILA claim, arguing that Bragg never consummated a transaction with it in which a TILA violation occurred. On January 24, 2003, the district court dismissed the TILA claim with prejudice and declined to exercise supplemental jurisdiction over Bragg's remaining state law claims. It concluded that Bragg never consummated either of the first two RISCs because the relevant agreements contained an unsatisfied condition precedent: specifically, neither party was "bound" until Bill Heard sold either of the RISCs to another lender.

On January 29, 2003, Bragg filed a motion for rehearing. On February 14, in a published opinion, the district court again held that the first two RISCs were never consummated and hence no TILA violated occurred. *Bragg v. Bill Heard*

Chevrolet, Inc., 245 F.Supp.2d 1235 (M.D. Fla. 2003). The court also rejected Bragg's renewed argument that Bill Heard failed to clearly state that the APRs in the first two RISCs were "estimates" and thus in violation of TILA. *Id.* at 1238-39.

This appeal followed.[4]

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[4] On February 7, Bragg filed a motion seeking approval to exceed the twenty-page limit for a motion for rehearing of the January 24 order dismissing Bragg's claims (which was docketed on January 27) and a February 3, 2003 order striking another class member's (John Cone) motion to intervene in the lawsuit (which was docketed on February 5). Attached to the motion was his proposed twenty-five page Fed. R. Civ. P. 59(e) motion for rehearing of the two orders, which the district court did not separately docket on that date but instead forwarded to chambers. On February 11, the court granted the motion for extension of the page limit and the clerk docketed the Rule 59(e) motion on the same day. On February 18, the district court denied Bragg's 59(e) motion. Bragg then moved for clarification as to whether the court, in its January 27 and February 18 orders, intended to remand his state law claims back to state court. On February 27, the court granted the motion for clarification and directed the clerk to remand the case to state court. On March 13, Bragg filed a notice of appeal to challenge the January 27 dismissal and the February 5 denial of Cone's motion to intervene.

To be timely, a notice of appeal in a civil case must be filed no later than thirty days after entry of the challenged order or judgment. Fed. R. App. P. 4(a)(l)(A). A motion to alter or amend a judgment, pursuant to Fed. R. Civ. P. 59(e), filed within ten business days of the entry of the challenged decision tolls the appeal period until the entry of the order resolving the last such motion.

Fed. R. App. P. 4(a)(4). The order resolving Bragg's Rule 59(e) motion was entered on February 18; hence, if the motion tolled the appeal period, the notice of appeal challenging the January 27 dismissal order was due on March 20.

We hold that Bragg's notice of appeal was timely. The Rule 59(e) motion, filed on February 7, was timely under Fed. R. App. P. 4(a)(4) to toll the appeal period prescribed by Fed. R. App. 4(a)(l)(A). Though the clerk did not docket the Rule 59(e) motion until February 11, Bragg physically filed the motion on February 7, the ninth business day

II. DISCUSSION

A. *Applicable law*

We review a district court's dismissal for failure to state a claim de novo. *Behlen v. Merrill Lynch*, 311 F.3d 1087, 1090 (11th Cir. 2002). In dismissing a complaint, the facts alleged therein must be taken as true and the district court must determine "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Marshall County Bd. of Educ. v. Marshall County Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993). Contract interpretation is a question of law that we review *de novo*. *Southland Distrib. Mktg. Co., Inc. v. S & P Co.*, 296 F.3d 1050, 1053 (11th Cir. 2002) (citing *Gymco Constr. Co., Inc. v. Architectural Glass and Windows, Inc.*, 884 F.2d 1362, 1364 (11th Cir. 1989)).

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following the entry of the January 27 dismissal order. Several circuits have determined that pleadings should be deemed filed on the date submitted to the clerk. *See Wight v. Bankamerica Corp.*, 219 F.3d 79, 83 (2d Cir. 2000); *Werth v. Makita Electric Works. Ltd.*, 950 F.2d 643, 646-47 (10th Cir. 1991); *Sierra On-Line, Inc. v. Phoenix Software. Inc.*, 739 F.2d 1415, 1419-20 (9th Cir. 1984). Fed. R. Civ. P. 5(e) provides that "filing of papers with the court as required by these rules shall be made by filing them with the clerk of the court . . . . The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules of practices." The clerk did not technically refuse Bragg's noncompliant 59(e) motion for filing. In fact, the motion bears the clerk's stamp that it was filed on February 7. In any event, it is apparent that here the district court excused any noncompliance with its local page limit rule and deemed the motion timely filed. Moreover, there is no evidence that Bragg exhibited a lack of diligence in filing his motion. In previous cases, we have been concerned that a motion to extend the appeal period may not be construed as a notice of appeal when it evinces uncertainty as to whether the party will in fact appeal. *See e.g., Harris v. Ballard*, 158 F.3d 1164, 1166 (11th Cir. 1998). That concern is absent here.

TILA's declaration of purpose states, in relevant part:

> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms . . . would be strengthened by the informed use of consumer credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

15 U.S.C. § 1601 (a). As a remedial statute, TILA must be construed liberally in favor of the consumer. *Ellis v. Gen. Motors Acceptance Corp.*, 160 F.3d 703, 707 (11th Cir. 1998); *Cody v. Cmty. Loan Corp. of Richmond County*, 606 F.2d 499, 505 (5th Cir. 1979).[5]

When a creditor sells credit property insurance in connection with a credit transaction, TILA requires the creditor to make certain disclosures to buyers before they become obligated on a RISC in which the creditor has excluded the charge for such insurance from the finance charge and included it in the amount financed. 15 U.S.C. § 1605(c). In this case, Bragg alleged that VTR, SAP and GAP constituted credit property insurance that was included in the amount financed and hence triggered the TILA requirements.

The specific content and timing of the disclosures are set forth in Regulation Z, which was adopted by the Federal

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[5] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to October 12, 1981.

Reserve Board in support of TILA. 15 U.S.C. § 1638(a); 12 C.F.R. §§ 226.2(a)(13) and 226.18; *see also Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980) (courts must defer to the regulations of the Federal Reserve Board when interpreting TILA). Regulation Z requires that the creditor disclose the identity of the creditor, the amount being financed, the annual percentage rate, the total sale price, and the total amount of payment. 15 U.S.C. § 1638(a); 12 C.F.R. § 226.18. These disclosures must be made "before credit is extended," a point known as "consummation." "Consummation means the time that a consumer becomes contractually obligated on a credit transaction." 12 C.F.R. § 226.2(a)(13). We evaluate TILA transactions from the consumer's viewpoint. *Cody*, 606 F.2d at 505.

Regulation Z also provides that, when determining the point at which a consumer becomes contractually obligated to a credit agreement, state law should govern. 12 C.F.R. § 226, Official Staff Commentary 2(a)(13). However, "although state law is determinative of when a contractual relationship is created, it has nothing whatsoever to do with how the transaction is to be characterized for [TILA] purposes"; that question is governed by federal law. *Cody*, 606 F.2d at 505. Under Florida law, the interpretation of contracts is a question of law if the contractual language is clear and unambiguous. *Press v. Jordan*, 670 So. 2d 1016, 1017 (Fla. App. 3 Dist. 1996).

B. *Consummation theory of TILA liability*

Bragg contends that the district court erred in holding that no pertinent credit agreement was consummated. He maintains that in this case, consummation occurred not when title to the automobile passed or when a bilateral contract was formed, but rather when he signed the RISCs, thereby becoming obligated on the credit agreement.

We agree that well-reasoned case law supports this interpretation. Recently, the Fourth Circuit held that TILA can encompass unfunded financing agreements. *Nigh v. Koons Buick Pontiac GMC, Inc.*, 319 F.3d 119, 123 (4th Cir. 2003), cert. granted, *Koons Buick Pontiac GMC. Inc. v. Nigh*, 124 S.Ct. 1144 (2004).[6]

Seeking to buy a car and trade in his existing vehicle, Nigh signed a Buyer's Order reflecting the proposed purchase and a RISC setting forth the proposed financing. *Id.* at 122. As in Bragg's case, the dealer did not countersign either document; rather, it intended to sign only ~~when a~~ lender agreed to buy an assignment of the installment payments owed under the RISC. *Id.* "The transaction's closing and the completion of Nigh's purchase were thus left within the dealership's unilateral control."*Id.*

Applying Regulation Z, the *Nigh* court joined others holding that consummation can encompass unfunded financing agreements. *See, e.g., Cannon v. Metro Ford, Inc.*, 242 F.Supp.2d 1322, 1330 (S.D.Fla. 2002); *Johnson v. Steven Sims Subaru. Inc.*, 1993 WL 76231 (N.D.Ill. 1993); *Bryson v. Bank of New York*, 584 F.Supp. 1306 (S.D.N.Y. 1984); *Madewell v. Marietta Dodge, Inc.*, 506 F.Supp. 286 (N.D.Ga. 1980); *Copley v. Rona Enterprises, Inc.*, 423 F.Supp. 979 (S.D.Ohio 1976); *see also Clark v. Troy and Nichols. Inc.*, 864 F.2d 1261, 1265 (5th Cir. 1989) (Thornberry, J., dissenting). We agree that this holding is consistent with Regulation Z's exclusive reference to the consumer's commitment. *See Nigh*, 319 F.3d at 124. It is also in keeping with TILA's overarching purpose of consumer protection. *See id.*

> [T]he point at which the consumer . . . commits himself or herself to the purchase of credit, without regard for the degree of commitment of the lender . . . [is the point at which] the consumer becomes vulnerable to actual

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[6] The certiorari petition does not concern the consummation issue.

> damage from the lender's inadequate or deceptive disclosures, for at this time he or she can be contractually bound to the terms of the lending contract at the option of the lender.

Bryson, 584 F.Supp. at 1317.

The district court held, however, that Bragg's obligations under the first and second RISCs never arose because they were contingent on Bill Heard's obtaining financing. It pointed out that the Purchase Contracts signed by Bragg set forth a condition precedent of financing approval. *Bragg*, 245 F.Supp.2d at 1238 n.4. The Purchase Contracts provided that the Seller agrees to sell the designated vehicle "provided however, the designated financial institution approves Purchaser's request for a loan . . ." The Purchase Contracts additionally stated, "Neither party hereto shall be bound to the other until terms of credit have been approved by both parties . . ." Moreover, the Bailment Agreement incorporated the terms of the Purchase Contracts and stated that it was "pending credit approval of buyer(s) by lending institution and completion of sales transaction."

Under Florida law, parties can condition formation of a contract on the occurrence of an event. *See, e.g., Huskamp Motor Co. v. Hebden*, 104 So. 2d 96, 98 (Fla.App. 3 Dist. 1958); 777 *Flagler Co. v. Amerifirst Bank*, 559 So. 2d 1210, 1211 (Fla. App. 4 Dist. 1990). There was no condition precedent set forth in the RISCs themselves. The district court held that under Florida contract law, however, the condition of financing approval contained in the Purchase Contracts and Bailment Agreement nonetheless was applicable. "Under Florida law, where two or more documents are executed by the same parties, at or near the same time and concerning the same transaction or subject matter, the documents are generally construed together as a single contract." *Clayton v. Howard Johnson Franchise Systems. Inc.*, 954 F.2d 645, 648

(11th Cir. 1992); *Quix Snaxx, Inc. v. Sorensen*, 710 So. 2d 152, 153 (Fla. 3d DCA 1998).

Bragg contends that the relevant Purchase Contracts and Bailment Agreement should not be considered along with the RISCs because they were not "executed" within the meaning of the applicable Florida case law, as they were never signed by Bill Heard. He also maintains that those agreements were ambiguous, requiring construction against the drafter, Bill Heard, and precluding its modification of the RISCs. Moreover, Bragg contends that the Bailment Agreement is void and unenforceable under Florida law because it was not first signed by Bill Heard, and because it contravenes public policy. *See* Fla. Stat. §§ 520.07(1)(a) and 520.07(7).

As an initial matter, it is far from clear whether the rule of contract law articulated in *Quix Snaxx* would apply to these documents. The RISCs provided simply, "[b]y signing this contract, you choose to buy the vehicle under the agreements on the front and back of this contract"; they did not refer explicitly to the Purchase Contract or any other document containing a condition precedent.

See Quix Snaxx, 710 So. 2d 153 ("Where a writing expressly refers to and sufficiently describes another document, the other document . . . is to be interpreted as part of the writing."). Nor did the Purchase Contracts or Bailment Agreements reference the RISCs. *See id.* Moreover, the RISCs contained a modification clause: "This contract contains the entire agreement between you and us relating to this contract. Any change to this contract must be in writing and we must sign it." Furthermore, as noted *supra*, Bill Heard did not sign the Purchase Contracts or Bailment Agreement, leaving them technically unexecuted. We could find no cases extending the *Quix Snaxx* rule to the circumstances alleged here.

We need not resolve this legal question, however. In any event, even assuming the RISCs contained a condition precedent, the district court was incorrect in finding that consummation occurred only upon assignment of the loan. Under the district court's interpretation of Florida law and Regulation Z, a creditor could provide necessary TILA disclosures after the consumer signed a conditional financing agreement as long as the disclosures were made sometime before the loan was assigned. Disclosures that come after the consumer executes a RISC, however, are likely to be of little or no value to that consumer.

Therefore, we reject the district court's reading of Regulation Z as contrary to the central goal of TILA, which is to provide "meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him." 15 U.S.C. § 1601 (a). As this court has explained, "[w]hile it is true that the language of a statute should be interpreted according to its ordinary, contemporary and common meaning, this plain-meaning rule should not be applied to produce a result which is actually inconsistent with the policies underlying the statute." *Bailey v. USC Corp.*, 850 F.2d 1506, 1509 (11th Cir. 1988) (emphasis added) (internal citation omitted). Given the strong remedial purpose of TILA and continual admonitions that we construe TILA and Regulation Z liberally in the consumer's favor, *see. e.g. Cody*, 606 F.2d at 505, we cannot accept the district court's interpretation of Regulation Z, as it would undermine the ability of prospective consumers of credit to weigh competing offers.

Regardless of "the degree of commitment of the lender" contained in the agreements' condition precedent, *Bryson*, 584 F. Supp. at 1317, Bragg's signature on these documents rendered him contractually obligated to the purchase of credit and thus constituted consummation for purposes of TILA disclosures. To give full effect to TILA's goal of providing

meaningful and timely disclosure of important credit terms, we hold that in a financing agreement containing a condition precedent where the condition of obtaining financing is within the exclusive control of the seller and third-party lender, consummation occurs when the consumer signs the contract.

C. *"Estimates theory" of TILA liability*

Bragg offers another theory of Bill Heard's liability under TILA: that it violated the statute by failing to label its credit terms in the first two RISCs as estimates and to compute the APR accordingly. In addition, he contends that Bill Heard violated TILA by disclosing an inaccurate APR in RISC #4, specifically by backdating the RISC #4 to September 28, 2001, and by computing the APR and charging interest from that date. In his reply brief, Bragg makes clear that these arguments are intended to be alternative positions to be pursued only if this court affirms the dismissal below. As we reverse, we need not address this theory.

III. CONCLUSION

For the reasons set forth *supra*, we REVERSE the district court's dismissal of Bragg's TILA claim and REMAND for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:02-cv-609-T-30EAJ

RANDALL S. BRAGG, *et al.*,
Plaintiffs,

v.

BILL HEARD CHEVROLET, INC.-PLANT CITY,
Defendant.

ORDER

THIS CAUSE comes before the Court upon Plaintiffs' Motion for Rehearing on January 24th Order and February 3rd Order and Memorandum of Law in Support (Dkt. #83). After close consideration this Court denies Plaintiffs' motion.

BACKGROUND

Plaintiffs brought this putative class action seeking statutory penalties, damages and restitution for alleged violations of the Truth in Lending Act, 15 U.S.C. § 1601, *et seq*. ("TILA") against Bill Heard, Florida Motor Vehicle Retail Sales Finance Act claims, Fla. Stat. § 520.01, *et seq*. ("Section 520") against Bill Heard, Florida Deceptive and Unfair Trade Practices claims, Fla. Stat. § 501.211 ("FDUTPA") against Bill Heard, and for restitution against all Defendants.

On September 25, 2002, Plaintiffs filed their Third Amended and Supplemental Class Action Complaint and Demand for Jury Trial (the "Complaint") (Dkt. #38). Plaintiffs' claims centered on disputes arising out of their

purchases or attempted purchases of motor vehicles from Bill Heard. The Plaintiffs' federal claim alleged that Bill Heard failed to comply with the mandatory disclosure requirements of TILA with respect to two of the Plaintiffs, Bragg and Crabtree.

Bill Heard moved to dismiss Bragg and Crabtree's TILA claim, arguing that Bragg and Crabtree never consummated a transaction with Bill Heard in which a TILA violation occurred. Plaintiff Crabtree conceded in the Complaint that he returned the motor vehicle he attempted to purchase and received his trade-in and down payment back from Bill Heard. Plaintiff Bragg conceded in his response to Bill Heard's motion to dismiss that there were no TILA violations in the final Retail Installment Sales Contract ("RISC").[1] Instead, Plaintiffs argued that because there were uncorrected TILA violations in unfunded RISCs, Bill Heard was still liable under TILA.

On January 34,2002, this Court entered its order granting in part Bill Heard's motion This Court dismissed with prejudice Bragg and Crabtree's TILA claims, to dismiss. concluding as a matter of Florida law that no transaction ever Consummated in which a TILA violation occurred.[2] With no remaining federa1 claims before it, this Court declined to exercise supplemental jurisdiction over Plaintiffs' state law claims and dismissed this action without prejudice.[3]

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[1] Plaintiffs attached all the EUSCs and purchase aseements for Bragg.

[2] This Court's ruling was based on the allegations concerning Bragg and Crabtree and not on the class allegations contained in the Complaint. No notice or opportunity to be heard was afforded to members of the class other than the named plaintiffs. This Court's order should have no effect on any claim other than the TILA claims of Bragg and Crabtree (the two named plaintiffs with TILA claims). *See, e.g.. Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1226-29 (11th Cir. 1998).

[3] When asked at oral argument on January 14, 3002, Plaintiffs' counsel responded that if there was no TILA violation, then there was no reason

On January 29, 2003, Plaintiffs belatedly filed a motion to have a new plaintiff intervene. On February 3, 2003, this Court concluded that a motion to intervene was untimely and struck the motion to intervene.

LEGAL ANALYSIS

A motion to alter or amend a judgment under Federal Rules of Civil Procedure Rule 59(e) lies within the sound discretion of the district court. *See American Home Assurance Co. v. Glenn Estess & Assocs., Inc.*, 763 F.2d 1237, 1238, 1239 (11th Cir. 1985). The underlying motion that this Court is being asked to reconsider is a motion to dismiss. Plaintiffs are correct that the appropriate standard for deciding to dismiss a complaint is whether it appears beyond a reasonable doubt that the Plaintiffs can prove no set of facts to support their claims. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *South Florida Water Management Dist. v. Montalvo*, 84 F.3d 402, 406 (11th Cir. 1996); *Marshall County Bd. of Educ. v. Marshall County Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993). This court, however, may dismiss a complaint on a dispositive issue of law. *See Marshall County*, 992 F2d at 1174; *Hunt v. American Bank & Trust Co.*, 783 F.2d 1011, 1013 (11th Cir. 1986). This Court's January 24, 2003, order dismissed the Complaint based on a dispositive issue of law: when consummation occurred.

A. Consummation

Bill Heard had no obligation to provide TILA disclosures prior to obtaining financing approval. TILA requires disclosure of certain information "before credit is extended." 15 U.S.C. § 1638(b)(1). Section 226.17(b) of Regulation Z interprets "before credit is extended" to require disclosure prior to the consummation of the transaction. 12 C.F.R.

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for this Court to exercise supplemental jurisdiction. *See* Hrg. Tr. 1/14/03 at 47.

§ 226.17(b). Consummation is further defined as "the time that a consumer becomes contractually obligated on a credit transaction." *See* 12 C.F.R. § 226.2(a)(13).

The Supreme Court has held that courts, like this Court, must grant great deference to the official staff commentary of Regulation Z. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980). The official commentary on the definition of consummation indicates that state law, not Regulation Z, determines when a consumer becomes contractually obligated. *See* 12 C.F.R. Pt. 226, Supp. 1 (Official Staff Interpretations), Commentary 2(a)(13). Florida contract law construes contract clauses like those in this case to create a condition precedent to contract formation. *See Huskamp Motor Co. v. Hebden*, 104 So.2d 96, 98 (Fla. 3d DCA 1958).[4]

This Court is not "eviscerating" TILA with its decision. It is, instead, heeding the Supreme Court's admonition and following the Federal Reserve Board's Official Staff Interpretation, which in turn requires this Court to follow Florida contract law.[5]

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[4] This Court has twice held that title to the motor vehicles did not pass when the original RISCs and purchase agreements were signed. While Plaintiffs may disagree, the documents attached to the Complaint are unambiguous that title passed only on (among other things) financing approval.

[5] This Court's decision on January 24, 2003, was in no way based on the fact that Bill Heard was not a creditor for TILA purposes. This Court declines to reach the "deception" issue raised for the first time in this motion by Plaintiffs. If this Court took Plaintiffs' invitation, it would first have to disregard an unambiguous contract and decide Plaintiffs novel state law claims. If those claims by chance are successful, it could then make a determination on Plaintiffs' TILA claims. Such a process is inefficient. Additionally, this Court has serious concerns about whether many of Plaintiffs' Section 520 and FDUTPA theories are supported under existing law (or nonfrivolous extensions/modifications thereto).

Plaintiffs rely on the recent decision of the Fourth Circuit in support of their expansion of liability under TILA. *See Nigh v. Koons Buick Pontiac GMC. Inc.*, case no. 01-2201, 2003 WL 231322 (4th Cir. February 4, 2003). Plaintiffs are correct that in *Nigh* the Fourth Circuit held that TILA can encompass unfunded financing agreements. *See* 2003 WL 231322, at *3. In the *Nigh* opinion, the Fourth Circuit, however, neither discusses the official interpretation of "consummation" under Regulation Z nor Virginia contract law. Instead, the Fourth Circuit concluded that the general consumer protection policy contained in TILA would be better served by extending coverage to unfunded financing agreements. *See id.* at *3-4.

This Court is not free to ignore the official staff interpretation (or Florida law) to reach what may or may not be a better policy result. This Court will defer to the Federal Reserve Board and its interpretation of consummation. In this case, this deference leads to the inescapable conclusion that Plaintiffs Bragg and Crabtree cannot state a claim for relief because an unsatisfied condition precedent existed in the transactions that contained alleged TILA violations.

B. Estimates

Bragg renews his argument that this Court's ruling makes the TTLA disclosures provided by Bill Heard estimates. Bragg does not argue that any disclosures made by Bill Heard were inaccurate based on the parties written agreement or the date that the parties agreed to use in the transaction documents. Instead, Bragg argues that the disclosures made were estimates because he did not have title to the motor vehicle and the contract was not actually consummated on the date contained in the contract. This Court in its prior orders (Dkts. #35, 58) did not make a distinction between conditions precedent or subsequent. The cases cited by this Court may have involved conditions subsequent, but this does not change this Court's analysis. Buyers and car dealers are not

prohibited under TILA from backdating a contract. Such arrangements provide benefits and value to consumers. In this case, Bragg got use of a motor vehicle without paying the rental fee due under the bailment agreement in exchange for backdating the contract. TILA is a statute that makes sure that the disclosures given to a consumer are accurate based on their agreement with the creditor. TILA does not prohibit, restrict, or otherwise control the parties' right to freedom of contract.

C. Motion to Intervene

Finally, Plaintiffs argue that this Court should have not stricken their motion to intervene because at 4:48 PM on January 23, 2003 (the night before the January 24, 2003 order was entered) they filed a notice with this Court telling this Court of their intent to have Cone intervene. A motion to intervene must be timely filed. *See United States v. U.S. Steel Corp*, 548 F.2d 1232, 1235 (5th Cir. 1977); *Haymond v. Lundy*, 205 F. Supp. 2d 390, 409 (E.D. Pa. 2002). Filing a notice at the eleventh hour and a motion four days later in these circumstances was not timely. Cone has offered no excuse for his delay in intervening in this suit. This action has been pending for over a year. The motion to dismiss that this Court granted was pending for over three months, and oral argument on the pending claims had been heard nine days before the filing of the notice. At that oral argument, Plaintiffs did not raise the possibility of intervention. Instead, Plaintiffs stated that there was no reason for this Court to retain jurisdiction if it dismissed Bragg and Crabtree's TILA claims. If Cone wishes to pursue his TILA claim, he may do so in a new suit. Without any reason for such a delay and with no prejudice to Cone, there is no reason for this Court to reconsider its February 3, 2003, order striking his motion to intervene.

It is therefore ORDERED AND ADJUDGED that:

(1) Plaintiffs' Motion for Rehearing on January 24th Order and February 3rd Order and Memorandum of Law in Support (Dkt. #83) is DENIED.

(2) The clerk is directed to terminate all pending motions and close this file.

DONE and ORDERED in Tampa, Florida on this 14th day of February, 2003.

/s/ James S. Moody, Jr.
JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel/Parties of Record

APPENDIX C

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

[FILED JAN. 24, 2003]

CASE NO: 8:02-cv-609-T-30-EAJ

RANDALL S. BRAGG, *et al.*,
Plaintiffs,

v.

BILL HEARD CHEVROLET, LNC.-PLANT CITY, *et al.*,
Defendants.

ORDER

This cause came on to be considered on:

(1) Defendant Bill Heard Chevrolet, Inc.-Plant City's ("Bill Heard") Motion for a More Definite Statement and to Dismiss "Third Amended" Complaint (Dkt. #44), memorandum of law (Dkt. #45), and notice of filing supplemental authority (Dkt. #71);

(2) Defendant Affiliated Financial Corporation's ("AFC") Motion to Dismiss, and or Motion for More Definite Statement and Memorandum of Law (Dkt. #46);

(3) Defendant Triad Financial Corporation's ("Triad") Motion to Dismiss or for More Definite Statement (Dkt. #47) and memorandum of law (Dkt. #48);

(4) Defendant WFS Financial, Inc.'s ("WFS") Motion to Dismiss, and/or, in the Alternative Motion for More Definite Statement and Memorandum of Law (Dkt. # 49);[1]

(5) Plaintiffs' memorandum in opposition (Dkt. # 56), responses thereto (Dkts. #59, 60, 6l), and notice of filing supplemental authority (Dkts. #70, 75).

After close consideration of the motions, memoranda of law, responses, and supplemental authority submitted by the parties, hearing oral argument on January 13, 2003, and being otherwise fully advised, the Court concludes as follows:

This Lawsuit

Plaintiffs bring this putative class action seeking statutory penalties, damages and restitution for alleged violations of the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.* ("TILA") against Bill Heard, Florida Motor Vehicle Retail Sales Finance Act claims, Fla. Stat. § 520.01, *et seq.* ("Section 520") against Bill Heard, Florida Deceptive and Unfair Trade Practices claims, Fla. Stat. § 501.211 ("FDUTPA") against Bill Heard, and for restitution against all Defendants. alternatively for a more definite statement. Defendant Bill Heard moves to dismiss all four counts or Defendants Triad, AFC, and WFS move separately to dismiss count four or alternatively for a more definite statement.

Plaintiffs' claims center on disputes arising out of their purchases or attempted purchases of motor vehicles from Bill Heard. The Plaintiffs' federal claim alleges that Bill Heard failed to comply with the mandatory disclosure requirements of TILA with respect to two of the Plaintiffs, Bragg and Crabtree. Bragg and Crabtree claim that Bill Heard improperly included costs for vehicle theft registration

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[1] Collectively Bill Heard, AFC, Triad, and VTS are referred to as "Defendants."

('VTR"),[2] Silencer alarm protection ("SAP"),[3] and GAP protection[4] in the amount financed section of their agreements instead of in the finance charge section without providing the necessary disclosures under TILA. This inclusion without disclosure allegedly caused two violations of TILA: (1) a disclosure violation; and (2) an inaccurate annual percentage rate ("APR").

The remaining parties with a federal claim[5]

Bragg

On September 28, 2001, Plaintiff Bragg signed two Florida Simple Interest Vehicle Retail Installment Sale Contracts ("RISCs"), a standard purchase agreement,[6] and a bailment

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[2] VTR is an anti-theft etching program that provides certain undisclosed property insurance benefits to customers if their motor vehicle is stolen. *See* Third Amended Complaint [hereinafter "Complaint" or abbreviated "Compl."] ¶ 92.

[3] SAP is a silencer alarm installed on at least some motor vehicles sold by Bill Heard that, like VTR, provide certain undisclosed property insurance benefits if their motor vehicle is stolen. *See id.* ¶ 99.

[4] GAP protection is coverage offered to a customer in the event the motor vehicle is determined by the applicable insurance company to be a total loss as a result of theft or physical damage, and covers the shortfall between the applicable insurance coverage and the amount still owed. *See id.* ¶¶ 105-106.

[5] The Complaint makes sufficiently clear that only Plaintiffs Crabtree and Bragg are making TILA claims. *See* Compl. ¶¶ 136, 137, 140. Moreover, Plaintiffs have also made clear that the only plaintiff making a GAP claim is Bragg. *See* Memo. in Opp'n at 5

[6] The purchase agreements provided that Bill Heard retained title pending credit approval. *See* Compl. Exs. A-1, A-5, A-6, B-1. Moreover, the purchase agreements also stated that ". . . Seller agrees to sell the designated vehicle only under the terms and conditions herein set forth, and agreed to by Purchaser, provided however, the designated financial institution approves Purchaser's application for a loan equal to the amount of a note to be executed by Purchaser." *See id.* (emphasis added). The purchase agreements further provided that in a credit transaction "neither

agreement, relating to a 2002 Silverado truck. *See* Compl. ¶¶ 14, 17, 18; Exs. A-1, A-2, A-3, A-4. The RTSCs differ principally on the APR (14.65% versus 14.5%). Compare Compl. Ex. A-3 with Ex. A-3. The purchase agreement included charges for VTR and SAP. *See id.* Ex. A-1. The two RISCs contained a charge for GAP protection. *See id.* Exs. A-2, Ex. A-3.

The bailment agreement provided that the transaction is not complete[7] and that "if Dealer is able to provide Buyer(s) with financing according to the terms of the Sales Agreement, said agreement [the purchase agreement] shall be binding upon Buyer(s) and enforceable by Dealer." *Id.* Ex. A-4. Title to the truck did not pass to Bragg, but because of the bailment agreement, Bragg was allowed to drive home in his truck. *See id.*

On October 1,2001, Bill Heard contacted Bragg, and requested that he sign additional contracts. *See id.* ¶ 20. Bragg signed two "new" purchase agreements and FUSCs, dating all the documents back to September 28, 2001. *See id.*; *id.* Exs. A-5, A-6. Bragg neither purchased VTR, SAP, nor GAP protection in the new purchase agreements or RISCs. *See id.*

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party hereto shall be bound to the other until terms of credit have been approved by both parties . . . ." *See id.* (emphasis added).

[7] The bailment agreements list more than credit approval as being necessary to complete the transaction. *See* Compl. Exs. A-4, B-3. Additionally, the buyer may still have to make a down payment or the parties may have to adjust the trade in value because the payoff on the trade-in was different than that which was contemplated on the purchase agreement. *See id.*

Further, the bailment agreements incorporate the terms of the purchase agreements, stating that "[d]elivery of said vehicle is subject to all terms and conditions in said sales agreement and in the promissory note and sales agreement, if any, executed concurrently or in accordance therewith. Said vehicle shall remain the property of dealer." *See id.*

Exs. A-5, A-6, A-7, A-8, A-9. The RISCs differed solely on the amount financed.[8] *See id.* Exs. A-7, A-8, A-9.

On October 5, 2002, a purchase agreement and RISC that neither included the purchase of VTR, SAP, nor GAP was completed and assigned to Defendant Triad. *See* Memo. in Opp'n at 10; Compl. Exs. A-6, A-9. It is this purchase agreement (the third) and RISC (the fifth) that Bragg is obligated under currently. *See* Memo. in Opp'n at 10 n.17.

Crabtree

On January 12, 2002, Plaintiff Crabtree signed a RISC, standard purchase agreement, and a bailment agreement, relating to a 1999 Dodge Durango.[9] *See* Compl. ¶¶ 32, 35, 36; Exs. B-1, B-2, B-3. The purchase agreement included VTR and an extended service plan in the amount financed section. *See id.* ¶¶ 24, 26, 28, Ex. A-1. Crabtree later returned the Dodge Durango to Bill Heard and received his cash deposit and trade-in back from Bill Heard. *See id.* ¶ 40.

Procedural Posture

On September 11, 2002, this Court entered its Order (Dkt. #35) granting in part and denying in part Bill Heard's prior Motion to Dismiss (Dkt. #6). The Court dismissed:

> (1) Plaintiffs Reichert, Stebbins, and former Plaintiff Weidman's TILA claims; (2) Plaintiffs' estimates claim under TILA; and (3) Plaintiffs Crabtree and Nichols GAP disclosure claim under TILA. The Court denied Bill Heard's motion as to: (1) Plaintiffs' claim that Bill Heard's VTR disclosure violated TILA; and (2) Plaintiff

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[8] The difference in the purchase agreements is attributable to Bragg purchasing an extended service contract in one of the purchase agreements and that increased the amount financed. Bragg has made no allegation that Bill Heard failed to properly disclose the extended service plan correctly.

[9] The language of Crabtree's agreements is identical to that of Braggs' agreements.

Bragg and former Plaintiff McGehee's GAP TILA disclosure claim.

On September 25, 2002, Plaintiffs filed their Third Amended and Supplemental Class Action Complaint and Demand for Jury Trial (DAL #38). Plaintiffs added Triad, AFC, and WFS as Defendants. Plaintiffs also added a count for restitution against all four Defendants. Moreover, this Complaint contains additional attachments and allegations, concerning principally Plaintiffs Bragg and Crabtree. These additional attachments and allegations have led to arguments that Bragg and Crabtree's claims should be dismissed for reasons not considered previously by this Court.

Standard of Review

The appropriate standard for deciding to dismiss a complaint is whether it appears beyond a reasonable doubt that the Plaintiffs can prove no set of facts to support their claims. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *South Florida Water Management Dist. v. Montalvo*, 84 F.3d 402, 406 (11th Cir. 1996); *Marshall County Bd. of Educ. v. Marshall County Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993). The Court must view the Plaintiffs' Complaint in the light most favorable to the Plaintiffs and construe the allegations in the complaint as true. *See Hishon v. King & Spalding*, 367 U.S. 69, 73 (1984); *Scheauer v. Rhodes*, 416 U.S. 232 (1974); *Quality Foods de Centro Am. S.A. v. Latin Am. Agribusiness Devel. Corp.*, 711 F.2d 989, 994-95 (11th Cir. 1983). Regardless of the alleged facts, however, a court may dismiss a complaint on a dispositive issue of law. *See Marshall County*, 992 F.2d at 1174 (11th Cir. 1993); *Hunt v. American Bank & Trust Co.*, 783 F.2d 1011, 1013 (11th Cir. 1986).

Legal Analysis

A. *TILA claim*

Defendant Bill Heard argues in its Motion to Dismiss that no TILA cause of action exists because Bragg and Crabtree never consummated a transaction with Bill Heard in which an alleged TILA violation occurred. In response, Bragg and Crabtree argue that a transaction was consummated for TILA purposes every time Bragg or Crabtree signed a purchase agreement or RISC regardless whether the purchase became completed. After careful consideration, this Court concludes that neither Bragg nor Crabtree consummated a transaction that contained an alleged TILA violation, and Bill Heard's Motion to Dismiss Plaintiffs' TILA claims should be granted.

TILA is a consumer protection statute designed to protect consumers from entering into contracts for financing without proper disclosure of fees, rates, and other information. *See* 15 U.S.C. § 1601, *et seq*. The Federal Reserve Board promulgated a set of technically intricate regulations that support TILA known as Regulation 2, 12 C.F.R. § 226.1, *et seq*. Strict compliance with TILA and Regulation Z is required. *See Shroder v. Suburban Coastal Corp*., 729 F.2d 1371, 1380 (11th Cir. 1984).

TILA requires disclosure of certain information "before credit is extended." 15 U.S.C. § 1638(b)(l). Section 226.17(b) of Regulation Z interprets "before credit is extended" to require disclosure prior to the consummation of the transaction. 12 C.F.R. § 226.17(b). Consummation is further defined as "the time that a consumer becomes contractually obligated on a credit transaction." *See* 12 C.F.R. § 2262 (a)(13).

The official commentary to this definition in turn indicates that state law, not Regulation Z, determines when a con sumer becomes contractually obligated. *See* 12 C.F.R. Pt. 226, Supp. 1 (Official Staff Interpretations), Commentary

2(a)(13).[10] The official interpretation additionally indicates that in determining when a transaction "consummated," facts such as whether the consumer pays some nonrefundable fee or suffers an economic penalty for failing to go forward are irrelevant. *See* 12 C.F.R. Chapter 2, art. 226.2 Supp. 1, at 676. Neither party has cited to a decision by the Eleventh Circuit or a district court, interpreting when consummation for TILA purposes occurs under Florida law.[11]

This Court agrees with Plaintiffs that an automobile is a "good"[12] and that Florida's version of Article 2 of the Uniform Commercial Code ("UCC") applies to both Bragg and Crabtree's dealings with Bill Heard.[13] Moreover, this Court agrees that formation of a sales contract under Florida law is generally governed by Section 672.204. Fla. Stat. § 672.203. Under Section 672.204, formation occurs "in any manner sufficient to show agreement." Fla. Stat. § 672. 204(1). Further, Section 672.204(3) provides that a contract can be made "[e]ven though one or more terms are left

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[10] In *Ford Motor Credit Co. v. Milhollin*, the Supreme Court held that courts must grant great deference to the official staff commentary to Regulation Z. 444 U.S. 555 (1980).

[11] Bragg and Crabtree do cite to the former Fifth Circuit case *Cody v. Community Loan Corn. of Richmond County*, 606 F.2d 499 (5th Cir. 1979). In *Cody*, the Fifth Circuit stated in the context of when a "sale" occurred that courts should examine the transaction "through the eyes of the consumer." *Id.* at 505. While this statement is helpful, it does not determine when contracts were formed under Florida law.

[12] The applicable test is whether the item is moveable at the time of identification to the contract for sale. *See* Fla. Stat. § 672.105(1). A motor vehicle clearly meets this definition.

[13] Under Florida law, contract interpretation is a question of law if the language of the contract is clear and unambiguous. *See Press v. Jordan*, 670 So. 2d 1016, 1017 (Fla. 3d DCA 1996); *Viennau v. Metropolitan Life Ins. Co.*, 548 So. 2d 856, 859 (Fla. 4th DCA 1989); *Zepfer v. Neandross*, 497 So. 2d 901, 903 (Fla. 4th DCA 1986). The language of the agreements in this case is clear and unambiguous.

open . . . if the parties have intended to make a contract . . ." Fla. Stat. § 672.204(3).

Where this Court disagrees with the Plaintiffs is that Article 2 of the UCC ends the analysis of whether and when a contract was formed in this situation. The UCC provides that in the absence of a particular provision governing a subject, Florida contract law supplements the UCC. Fla. Stat. § 671.103. In this case, the purchase agreements all contain a condition precedent to contract formation.[14] The purchase agreements specifically state that "neither party hereto shall be bound to the other until *terms of credit* have been approved by both parties . . . ." *See* Compl. Ex. A-1, A-5, A-6, B-1 (emphasis added).[15]

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[14] At oral argument Plaintiffs Bragg and Crabtree contended that the RISCs, purchase agreements, and bailment agreements that they executed contemporaneously should not be construed together. Alternatively, Plaintiffs contended that the merger clause in the RISCs eliminated the bailment agreements (and the purchase agreements presumably too). Plaintiffs contention is contrary to Florida contract law. Florida contract law holds that "[d]ocuments executed by the same parties, on or near the same time, and concerning the same transaction or subject matter are generally construed together as a single contract." *Quix Snaxx. Inc. v. Sorensen*, 710 So. 2d 152, 153 (Fla. 3d DCA 1998) (emphasis added); *also Mnemonics. Inc. v. Max Davis Assocs., Inc.*, 808 So. 2d 1278, 1280 (Fla. 5th DCA 2002) (stating same). This Court concludes that the RICSs, purchase agreements, and bailment agreements executed contemporaneously concerning the same motor vehicles should be construed as one integrated contract.

Similarly, Plaintiffs argued that Florida Statutes Sections 520.07(7) and 520.13 void the bailment agreements because the bailment agreements were not signed first by Bill Heard. This Court finds this argument unpersuasive. Following Plaintiffs argument to its logical conclusion then all the agreements in this case would have been void, including the agreement that in Bragg's case gave him title to his truck.

[15] The purchase agreements provided that Bill Heard retained title pending credit approval. *See* Compl. Exs. A-1, A-5, A-6, B-1. Moreover, the purchase agreements provided that ". . . Seller agrees to sell the

Florida contract law recognizes that parties can condition formation of a contract on the occurrence of an event. *See. e.g., Huskamp Motor Co. v. Hebden*, 104 So. 2d 96, 98 (Fla. 3d DCA 1958) (holding similar financing condition in automobile purchase agreement a condition precedent); 777 *Flagler Co. v. Amerifirst Bank*, 559 So. 2d 1210,1211 (Fla. 4th DCA 1990) (concluding contract not formed when condition precedent, agreeing to exhibits by specified date, not accomplished); *Zepfler v. Neandross*, 497 So.2d 901, 902-03 (Fla. 4th DCA 1986) (holding condition precedent not satisfied when financing arranged higher than cap); *Curry v. Security Life and Trust Co.*, 187 So. 2d 906, 907 (Fla. 2d DCA 1966) (concluding insurance contract not binding until condition precedent met).[16] The UCC is silent on the effect of conditions precedent on the formation of a contract. Therefore, Florida contract law on conditions precedent supplements Section 672.204.

Turning to the Complaint, Bragg and Crabtree's alleged TILA violations did not occur in a transaction that was consummated.[17] In Crabtree's case, financing was never

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designated vehicle only under the terms and conditions herein set forth, and agreed to by Purchaser, provided however, the designated financial institution approves Purchaser's application for a loan equal to the amount of a note to be executed by Purchaser." *See id.* (emphasis added). The bailment agreements contained similar provisions and incorporate the purchase agreements and RISCs by reference.

[16] *See. e.g., also Wickenheiser v. Ramm Vending Promotion. Inc.*, 560 So. 2d 350, 352 (Fla. 5th DCA 1990) (stating that evidence of oral condition precedent admissible to show no distributorship agreement existed even though written executed agreement existed); Ketchian v. Concannon, 435 So. 2d 394, 395 (Fla. 5th DCA 1983) (holding same in reprds to promissory note); Beach Kevs. Inc. v. Girvin, 213 So. 2d 3 14, 315-16 (Fla. 1st DCA 1968) (holding evidence of oral condition precedent admissible to show executed mortgage not effective).

[17] The only binding agreement between either Bragg or Crabtree and Bill Heard at the time of signing was the bailment agreements. This court

approved and he returned the new car and Bill Heard returned his trade-in and down payment. *See* Compl. ¶ 40. In Bragg's case, he did not purchase VTR, SAP,[18] or GAP in the

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has previously concluded that the bailment agreements were interim rental agreements under which Bragg and Crabtree got immediate possession of new motor vehicles pending approval of their respective RISCs. In exchange for the bailment agreement, Bragg and Crabtree each signed purchase agreements, IIISCs, made down payments, and left their trade-in.

Taking possession of the new motor vehicle, making a down payment, and leaving a trade-in at the dealership are not inconsistent with the purchase agreement not being consummated. If Bill Heard could not obtain financing at the rates provided for in the RISCs, the parties could either enter into a new purchase agreement (or EIISC) or the Plaintiffs could obtain their down payment and trade-in back (or its value) and walk away. This is exactly what happened to Crabtree.

[18] Without explanation in Footnote 20 of their brief, Plaintiffs indicate that Bill Heard purchased and enrolled Bragg into the SAP program without charge to Bragg. First, this fact was not pled in the Complaint. Second, the Court is unsure how this fact could possibly create a cause of action for Bragg. At oral argument, Plaintiff Bragg indicated that it would not create a cause of action.

Moreover, the purchase agreement that consummated Bragg's transaction clearly struck out and did not charge Bragg for VTR protection. *See* Compl. Ex. A-6. Further, the selling price of the vehicle (excluding items like SAP, VTR, and GAP) actually decreased from the original proposed transaction, *see* Compl. Ex. A-1, to the final transaction by over $200 (not to mention the $199.00 that was not charged for VTR). *See* Compl. Ex. A-6. This would seem to undermine any basis against Bill Heard for hiding finance charges in the selling price.

At oral argument Plaintiffs, instead, contend that, if this Court were to find the condition a condition precedent, then the Court would have to reinstate their previously dismissed estimates claim. This Court concludes that finding the condition to be a condition precedent has no effect on its prior ruling. In the Court's prior order (Dk. #35), the Court specifically considered the conditional nature of the parties agreements in this case and found that a conditional agreement does not make the annual percentage rate an estimate. The Court did not condition its analysis on the condition created by the estimate. This Court's prior order did not

transaction that was finalized and assigned to Triad. *See id.* Exs. A-6, A-9.

In addition to Florida law, this Court believes that the case law developed in this area supports this Court's ruling. The cases on this subject can be divided into two categories.

The first category involve cases, like this one, where the parties have conditioned contract formation on the occurrence of an event. In those cases, courts have concluded the transaction not consummated and TILA not violated. *Clark v. Trov and Nichols, Inc.*, 864 F 2 d 1261, 1264 (5th Cir. 1989) (concluding that consummation did not occur after the parties signed a rate lock in agreement because the lender conditioned the agreement to credit investigation and approval); *Jackson v. Grant*, 890 F.2d 118, 120-21 (9th Cir. 1989) (holding that consummation of a real estate loan did not occur when the agreement was conditioned upon the finding of a lender to finance the transaction); *Baxter v. Sparks Oldsmobile. Inc.*, 579 F.2d 863, 864 (4th Cir. 1978) (concluding, in a case where the contract contained a condition precedent for financing approval, that TILA did not apply because no binding contract existed); *Hodges v. Koons Buick Pontiac GMC. Inc.*, 180 F. Supp. 2d 786, 792-93 (E.D. Va. 2001) (holding that an unfunded RISC was irrelevant to and did not create a basis for TILA liability).[19]

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restrict its analysis to any specific type of condition.

[19] In *Hodges*, the plaintiff financed the purchase of a used Grand Am. *See id.* at 789. The original RISC and purchase agreement allegedly contained a violation of TILA. *See id.* at 791-92. After not being able to obtain funding, a second separate purchase agreement and RISC were entered into, approved, and funded. *See id.* at 790-91. The second RISC charged the same fees as the first but gave a corrected disclosure that complied with TILA. *See id.* at 792-93.

Bragg and Crabtree's argument that *Hodges* is distinguishable from the present case because the final RISC in this case did not correct the error under 15 U.S.C. § 1540(b) ignores half the holding that the first RISC was

The second category of cases on when consummation occurs, which includes cases upon which Plaintiffs rely, involves situations where the contract is formed and then found to be unenforceable because of state law or a condition subsequent excuses performance. In those cases, courts have concluded the transaction was consummated and TILA disclosures were due. *See Davis v. Werne*, 673 F.2d 866, 870-71 (5th Cir. 1982) (involving the mutual rescission of a consummated unconditional contract because the dealer was unable to assign the finance contract); Williams v. Public Finance Corp., 598 F. 2d 349, 356 (5th Cir. 1979) (stating fact that Georgia made contract unenforceable did not relieve defendant from TILA disclosure obligations); *Dryden v. Lou Budke's Arrow Finance Co.*, 630 F.2d 611, 645-46 (8th Cir. 1980) (holding that the fact Missouri law invalidated note was irrelevant to TILA disclosure obligations); *Graves v. Tru-Link Fence Co.*, 905 F. Supp. 515, 519-20 (N.D. Ill. 1995) (finding financing condition to be condition subsequent under Illinois law).

The only case cited by Plaintiffs that does not neatly fit into these two categories is *Madewell v. Marrietta Dodge. Inc.*, 506 F. Supp. 286,287-88 (N.D. Ga. 1980). In that case, the dealer did not sign the agreement, the agreement was unconditional on its face, but there was an alleged oral understanding (disputed by the plaintiff) that the contract was not binding until financing was found. *See id.* at 287. The parties subsequently rescinded the contract when financing could not be found. *See id.* In that case, the court did hold that the transaction was consummated as to the consumer, and therefore disclosures had to be made. *See id.* at 288-89. The court did not mention or discuss Georgia contract law, as required under TILA, or whether the oral contract was a condition precedent to contract formation. It appears the court

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"irrelevant" because the transaction was not funded.

chose not to believe the alleged oral understanding and instead found that the parties had, in effect, undone a completed transaction by rescission. *Madewell*, then, is inapposite to the current situation because Bragg and Crabtree never rescinded an already consummated transaction.

Because the purchase agreements and RISCs that allegedly violate TILA contain a condition precedent that was not satisfied, neither Brags nor Crabtree consummated a transaction under Florida law. Accordingly, Bill Heard's Motion to Dismiss is granted with prejudice as to Count I of the Complaint.

B. *State Law Claims*

Because the Court has resolved Plaintiffs' federal claim, only Plaintiffs' state law claims remain in this action. This Court may decline to exercise supplemental jurisdiction over state law claims where it has dismissed all the underlying federal claims. *See* 28 U.S.C. § 1367(c)(3). In making this determination the court is to consider factors such as "comity, judicial economy, convenience, fairness, and the like." *Crosby. Paulk*, 187 F.3d 1339, 13 52 (11th Cir. 1999). Although this decision is discretionary, dismissal of state law claims is strongly encouraged where the federal claims are dismissed prior to trial. *See Baggett v. First Nat'l Bank*, 117 F.3d 1342, 1353 (11th Cir. 1997). Where the court declines to exercise supplemental jurisdiction over such claims, the remaining state law claims should be dismissed without prejudice so that they can be re-filed in the appropriate state court. *See Crosby*, 187 F.3d at 1352. In the interest of judicial economy and convenience, the Court declines to exercise supplemental jurisdiction over the remaining state law claims in this action. Accordingly, Defendants Motions to Dismiss (Dkts. #44, 45, 46, 47, 48, 49) are denied without prejudice to bringing them in state court.

C. *Motions for More Particular Statement*

Because this court is declining to exercise supplemental jurisdiction over Plaintiffs remaining state law claims and dismissing Plaintiffs Complaint without prejudice, this Court need not reach Defendants' motions for more particular statement. Accordingly, Defendants Motions for a More Particular Statement are denied as moot.

Accordingly, it is ORDERED AND ADJUDGED that:

1. Defendant Bill Heard's Motion to Dismiss (Dkts. #44, 45) is GRANTED in part with prejudice and DENIED in part without prejudice as set forth herein.

3 Defendants AFC, Triad, and WFS' motions to dismiss (Dkts. 46, 47, 48, 49) are DENIED without prejudice to bringing them in state court.

3. Defendants motions for a more particular statement (Dkts. 44, 45, 46, 47, 48, 49) are DENIED as moot.

4. The Clerk is directed to close the file and terminate all pending motions.

DONE AND ORDERED in Chambers at Tampa, Florida, on 24 day of January, 2003.

/s/ James S. Moody, Jr.
JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:

Counsel/Parties of record
Courtroom Deputy
Law Clerk